IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

George Leib, *Appellant*,

vs.

O. P. Halligan and United States of America, *Appellees*.

No. 2747

In the Matter of the Application of George Leib for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Appellees

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HON. EDWARD E. CUSHMAN.

Brief of Appellees

STATEMENT OF FACTS.

The defendant was indicted under section 150 of the Federal Penal Code of 1910, reading as follows:

> "* * * or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or

executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same."

The defendant was indicted on five counts, the first of which is in substance as follows:

"* * * did knowingly and feloniously have in his possession, with intent to use the same and thereby to defraud some person or persons to the grand jurors unknown, said possession not being under authority from the Secretary of the Treasury of the United States, or from any other proper officer, a certain obligation made in part after the similitude of an obligation issued under the authority of the United States, * * * being then and there made by attaching and fastening together back to back, two notes purporting to have been issued by The Augusta Insurance & Banking Co., Georgia, of the denomination of Ten Dollars each, * * * by the use of paste and other substance and means to the grand jurors unknown; that the said obligation * * * is on the one side thereof in words and figures as follows, to-wit:

'The GEORGIA 10
AUGUSTA INSURANCE & BANKING CO.
10
No. 26 B Augusta
10 March 1860
Will pay TEN DOLLARS to bearer
on demand. No. 26 B
Ten X

Robert Walton, Cashr. Wm. M. D. Antigna, Prest.'

and on the reverse side there of * * * in words and figures as follows, to-wit:

'The GEORGIA 10
AUGUSTA INSURANCE & BANKING CO.
10
No. 1298 A Augusta
8 June, 1860
Will pay TEN DOLLARS to bearer
on demand. No. 26 B
Ten X

Robert Walton, Cashr. Wm. M. D. Antigna, Prest.' and which obligation * * * was then and there in form, color, size, and in the manner and style of display of the printing and engraving thereon, and in their general appearance, made and intended to be made after the similitude of an obligation issued under the authority of the United States, that is to say, after the similitude of a United States legal tender note of the denomination of ten dollars, he, the said George Leib, then and there well knowing said obligation not to be a lawful and genuine obligation issued under the authority of the United States and with the intent of the said George Leib to use the said obligation by uttering the same as and for a lawful obligation issued under the authority of the United States * * *"

The other four counts of the indictment are in substantially the same language, and differ only in alleging that the similtude is to another kind of monetary obligation of the United States of America.

The jury found the defendant guilty, and he was sentenced on all five counts of the indictment, and is now serving under such sentence.

ABSENCE OF PHRASE "THE UNITED STATES OF AMERICA"

The petitioner in his brief lays emphasis on the fact that nowhere upon these notes does there appear the words or phrase "The United States of America," and urges that on that account the instrument could not be said to be after the similtude of any obligation of the United States. The statute does not say that this is required. All that it demands is that a man shall not have in his possession any "obligation or other security made or executed in whole or in part after the similtude of any obligation issued under authority of the United States." To be within the provisions of the statute it is not necessary that the obligation should have the phrase "United States of America" or any other langua used on United States notes, provided the general appearance of the obligation sufficiently resembles the United States security to deceive a person of ordinary prudence. This point is covered in t cases of *United States v. Webber*, 210 Fed. 973, and *United States v. Sprague*, 48 Fed. 828, wherein it was held that it was not a necessary element of such

offense that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States.

The statute does not say that there must be a counterfeit, and even if it did, it would not necessarily follow that this phrase would have to appear on the face of the obligation.

NECESSITY FOR ALTERATION OF THE INSTRUMENT

The petitioner seems to have the impression that to make a man guilty under this act he must have altered or changed in some manner the printing and engraving on the obligation. This was not held necessary even under the old act which provided "every person who has in his possession any obligation or other security engraved and printed after the similitude * * *" Thus, notice the cases of *United States v. Stevens* and *United States v. Webber*, both of which are cited and quoted below in this brief. In neither of these cases was there any evidence that there had been any alteration in the printing and engraving on the instruments; and both of them were cases in which the obligations under consideration were notes of state banks, valid

at the time of their issuance. The statute does not say that there must be such alteration; it merely says the obligation must be made or executed in whole or in part after the similitude of an obligation of the United States, and necessarily means made in any manner. The defendant was not being tried for forgery, and so it was not necessary that he, himself, should have made the alteration.

POSSESSION PROHIBITED IN ALL CASES

It is not in evidence in this case, and the court cannot take judicial notice of the fact that Georgia Bank Notes and Confederate Bills in the likeness and similitude of obligations of the United States are in the possession of curio dealers for the purpose of sale, and so this is a question that the court cannot consider in this case. If this were the case and it were discovered by the authorities that the curio dealers were using their trade as a cloak to pass off on the public such worthless confederate and old state bank notes as being genuine obligations and securities of the United States, we have no doubt that a court would refuse to grant a non-suit and that the jury would return a verdict of guilty against them.

An officer has to use his common sense in the enforcement of the law and there are every day

technical violations of the letter of various state and United States laws, and yet no grand jury would indict and no jury would convict in such instances. The law clearly means that a person is prohibited from having in his possession obligations forbidden in the Act with the intent to negotiate them as genuine.

CASES ON ALL FOURS SUSTAINING US.

The appellant contends that there are no cases similar to this one and yet grants that there have been rulings in similar cases on a demurrer to the indictment. If an alleged defect in an indictment is not deemed by the court sufficient to sustain a demurrer, certainly the same defect cannot be taken advantage of by the accused by a petition for a writ of habeas corpus after the trial is over and while he is serving his sentence. If the cases in point are all those wherein the objections were raised by demurrer, it shows that this is the proper way to urge such a point of law as the appellant endeavored to raise in the lower court by a petition for a writ of habeas corpus. If the appellant had offered the same objections to his detention by a demurrer to the indictment or a demurrer to the evidence, or by motion for judgment notwithstanding the verdict, and the court had overruled him, his remedy, if any,

would have been to appeal to the Circuit Court of Appeals, and he cannot cure such a mistake by a petition for a writ of habeas corpus. We have no doubt that the substance of the appellant's petition was called to the attention of the trial court, and if it were not, it should have been, and so this question is res adjudicata and the decision of the court and jury cannot be reversed by a writ of habeas corpus. The writ of habeas corpus was not intended to be a second writ of review; if it were, litigation would be interminable.

Some of the most able judges in the United States have already passed upon the points raised in this petition and decided them in favor of the government.

In the case of *United States v. Sprague*, 48 Fed. 828, it was held that,

> "To constitute the offense it is not necessary that the instrument should purport to be an obligation of the United States, or bear such a likeness thereto as to deceive experts or cautious men; and that it is sufficient if it is calculated to deceive a sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest."

and the court says on pages 829-830,

"The object of this statute evidently was to

> make it unlawful for any person to have in his possession without proper authority, and with intent to sell or otherwise use the same, any obligation or security, whether purporting to be but not in fact issued under the authority of the United States, or purporting to be or in fact made or issued by any individual or any public or private corporation, engraved and printed after the similitude of a genuine obligation or security of the United States."

The case of *United States v. Stevens*, 52 Fed. 120, was one arising under the old Act, and we call the court's attention to the statute quoted in the opinion. Although the old statute used the words "engraved and printed after the similitude," the court held that,

> "The fact that a note was originally issued by a duly authorized state bank, and that it was a legal note at the time of its issuance, does not, after it has become utterly worthless by the insolvency of the bank, exempt the holder of it from prosecution, under section 5430 of the Revised Statutes, if he has it in possession with intent to sell or otherwise use it, and pass it as a genuine note or obligation of the United States."

and on pages 120-121 the court uses the following language:

> "The indictment in this case is under the following provision of section 5430 of the Revised

Statutes of the United States:

> 'Every person * * * who has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same, * * * shall be punished (in the manner prescribed in the statute.)'

The evidence before the court, at present, shows that the note or obligation which the defendant is charged with having had in his possession, with intent to sell or otherwise use the same, was a note issued by a regularly chartered state bank, but which at the time defendant is alleged to have had in his possession the note in question was utterly insolvent and its notes worthless.

* * * The object of the provision of the statute under which this indictment is framed is manifestly to preserve the integrity of the national treasury and bank note currency, and to prevent the imposition on the public of worthless notes or obligations of any kind purporting to be the genuine obligations of the United States. It seems to the court that the fact that the note in quetsion was originally issued by a duly authorized bank, and that it was a legal note at the time of its issuance, does not, after it has become utterly worthless by the insolvency of the bank, exempt the holder of it from prosecution, if he has it in possession with intent to sell or otherwise use it, falls within

the mischief intended to be prevented by the statute. 'To constitute the offense, it is not essential that the fraudulent note or obligation should on its face purport to be an obligation of the United States.' *U. S. v. Williams*, 14 Fed. Rep. 551."

In the case of *United States v. Fitzgerald*, 91 Fed. 374,

"There was found in the defendant's possession a paper purporting to be a certificate for 100 shares of the capital stock of the Denver Mining Company, of the par value of $1,000. Said certificate, as to its size, quality of paper, and style of printing, resembles a United States bond for the sum of $1,000, and upon the face of it there are printed above the purported certificate, the following words and figures:

'$1,000 $1,000

The
UNITED STATES
Number $1,000 Letter
A.
ONE THOUSAND DOLLARS.'

The paper also has a heavy green border and scroll work resembling somewhat the ornamentation of United States bonds."

The court held that the defendant was guilty under the Act, though the obligation was that of a private corporation, and on page 375-376 uses the following language:

"Now, the similitude must be in such a degree as to furnish a resemblance so near to the government obligations or securities that it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction. The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares, in dealing with a person whom he believed was acting honestly. If it could be so used against a person of that kind, when unsuspecting or unwary, as to deceive him, and be effectual to commit a fraud, then it would be in the similitude as intended by this statute. Of course, the government claims no exclusive right to each and all of the details of its printing or engraving. As to the use of the words 'United States,' or the green border, or any of the words singly or by themselves, the government does not claim an exclusive right to the use; but the paper is to be considered as an entirety, and if there is such an imitation on the face of the paper, when you consider the kind of paper, the size, and the color, and the general style of it, that you can say that that paper is in the similitude of a security or obligation of the United States, and so well executed as to deceive an intelligent person in a business transaction, then it is sufficiently in the similitude of a government obligation to warrant you in finding that fact against the defendant in this case; otherwise not."

In the case of *United States v. Webber*, 210 Fed. 973, the court will observe from the language of the opinion, at page 975, that the indictment was

almost in the same language as that in this case, and that the notes were state notes pasted back to back exactly as in this case, and that the court, after carefully reviewing all of the authority, upholds the indictment. The court says that the authorities bearing on this question cannot be reconciled; but it seems to us that the cases cited as being against us did not arise under the same state of facts: Thus, in the case of *United States v. Barrett*, 111 Fed. 369, the bill in question was the fac similie of a confederate bill, and there was no pasting together of two bills; in the case of *United States v. Conners*, 111 Fed. 734, there were two state bank notes, but they were not pasted together; and the same thing is true of the case of *United States v. Pitts*, 112 Fed. 522. But even if these cases were against us, they were all decided under the old act, and the weight of authority is in our favor.

Judge Rudkin, in *United States v. Webber*, 210 Fed. 973, at page 976, uses the following language:

> "I am further of opinion that the true rule of construction, and the rule supported by the weight of authority, is the rule adopted and followed by the judges of this district. Under that rule it is not necessary that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States. Nor is it necessary

> that the similarity or resemblance should be so great as to deceive experts, bank officers, or cautious men. It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest. If the fraudulent obligation is of that character, the offense is made out, and whether such a similarity or resemblance exists is, in ordinary cases, a question of fact for the jury."

The reasoning of the court is consistent with the language of the statute. The statute says, "any obligation or other security," and does not limit it to those issued by any particular person or corporation. Again, the statute says, "made or executed in whole or in part after the similitude." According to the appellant's contention the words "in part" should be discarded; but it is the duty of the court to give effect to all of the language of a statute.

The chief reliance of the appellant is in the case wherein Gross S. Edison was released by writ of corpus from the Kansas penitentiary. Judge Pollock apparently rendered no written decision. In this case it does not appear that the United States Attorney resisted the petition, and so it could not be used as a precedent in the face of the other cases to

the contrary decided in this district. We are unable to find any cases decided under the last statute holding against our position, and so we have the authority and better reasoning in our favor. We therefore urge that the lower court should be sustained.

Respectfully submitted,

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